***United States Court of Appeals***

***for the Second Circuit***

# AMICUS BRIEF

orig w/ affidavit

# 77-7134

## United States Court of Appeals

**FOR THE SECOND CIRCUIT**

**Docket No. 77-7134**

UNITED STATES COURT OF APPEALS
FILED
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SECOND CIRCUIT

UNITED STATES TOUR OPERATORS ASSOCIATION, EDEN DAN TOURS, EUROPACAR TOURS, INC., ARTHUR FRIEDMER CHARTERS, INC., PATHFINDER CORPORATION and UNITOURS,

*Plaintiffs-Appellees,*

*—against—*

TRANS WORLD AIRLINES, INC., TRAVELLERS AIR SERVICES, INC., TRAVELLERS INTERNATIONAL TOUR OPERATORS, INC. and TRAVELLERS INTERNATIONAL,

*Defendants-Appellants.*

## BRIEF OF THE CIVIL AERONAUTICS BOARD AMICUS CURIAE

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# United States Court of Appeals

## FOR THE SECOND CIRCUIT

**Docket No. 77-7134**

UNITED STATES TOUR OPERATORS ASSOCIATON, BRENDAN TOURS, EUROPACAR TOURS, INC., ARTHUR FROMMER CHARTERS, INC., PATHFINDER CORPORATION and UNITOURS,

*Plaintiffs-Appellees,*

*—against—*

TRANS WORLD AIRLINES, INC., TRAVELLERS AIR SERVICES, INC., TRAVELLERS INTERNATIONAL TOUR OPERATORS, INC. and TRAVELLERS INTERNATIONAL,

*Defendants-Appellants.*

## BRIEF OF THE CIVIL AERONAUTICS BOARD AMICUS CURIAE

### Preliminary Statement

The interlocutory appeal before this Court purports to be taken pursuant to 28 U.S.C. § 1292 from a decision of the Honorable Charles E. Stewart, United States District Judge for the Southern District of New York, denying defendants-appellants' motions to dismiss the complaint. The basis of those motions and the claim raised on this appeal is that the doctrine of primary jurisdiction requires the referral of this case to the Civil Aeronautics

Board ("CAB") prior to, or in lieu of, final disposition by the District Court. This memorandum is submitted *amicus curiae* for the purpose of expressing to the Court the views of the CAB with respect to this issue. For the reasons set forth below, the CAB submits that the doctrine of primary jurisdiction is not applicable to the issues raised in the complaint and that the motion was properly denied by the District Court.* Moreover, as has been noted by all parties to the action, the CAB is presently conducting an informal investigation into the legality of the charter program which is the subject of this action. As a result of that investigation, counsel is advised that the CAB intends to move to intervene in the action pursuant to Rule 24 of the Federal Rules of Civil Procedure, although not necessarily upon the same allegations contained in plaintiffs' complaint.**

## ARGUMENT

### The District Court Correctly Held That the Doctrine Of Primary Jurisdiction Does Not Bar Its Jurisdiction Over The Issues Raised In The Complaint.

This action was commenced pursuant to Section 1007 (a) of the Federal Aviation Act (the "Act"), 49 U.S.C. § 1487(a), seeking injunctive relief on the ground that defendants, a major airline and several charter tour operators, have violated and are continuing to violate

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* A similar position was taken in the District Court by the CAB as *amicus curiae.*

** The CAB takes no position as to the merits of the allegations contained in that complaint.

Section 401(a) of the Act, 49 U.S.C. § 1371(a).* In essence, the complaint charges that the defendants have violated certain conditions prerequisite to their authority to operate charter tours and are therefore in violation of Section 401(a) which prohibits an "air carrier" from "engaging in air transportation" without requisite authority from the CAB. The violations charged center on the alleged control of the tour operators by the air carrier.

A party in interest is permitted to seek judicial enforcement of 49 U.S.C. § 1371(a), as plaintiffs are doing herein, regardless of whether the CAB is a party to the action and regardless of whether the matter was previ-

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* 49 U.S.C. § 1487(a) provides as follows:

> If any person violates any provisions of this chapter, or any rule, regulation, requirement, or order thereunder, or any term, condition, or limitation of any certificate or permit issued under this chapter, the Board or Administrator, as the case may be, their duly authorized agents, or, in the case of a violation of section 1514 of this title, the Attorney General, or, *in the case of a violation of section 1371(a) of this title, any party in interest, may apply to the district court of the United States, for any district wherein such person carries on his business or wherein the violation occurred, for the enforcement of such provision of this chapter, or of such rule, regulation, requirement, order, term, condition, or limitation; and such court shall have jurisdiction to enforce obedience thereto by a writ of injjunction* or other process, mandatory or otherwise, restraining such person, his officers, agents, employees, and representatives, from further violation of such provision of this chapter or of such rule, regulation, requirement, order, term, condition, or limitation, and requiring their obedience thereto. [Emphasis added].

49 U.S.C. § 1371(a) provides as follows:

> No air carrier shall engage in any air transportation unless there is in force a certificate issued by the Board authorizing such air carrier to engage in such transportation.

ously preferred to the CAB or administrative remedies have been exhausted. 49 U.S.C. § 1487(a). See *C.A.B.* v. *Aeromatic Travel Corp.*, 489 F.2d 251 (2d Cir. 1974); *World Airways, Inc.* v. *Northeast Airlines, Inc.*, 349 F.2d 1007 (1st Cir. 1965), *cert. denied*, 382 U.S. 984 (1966); *Flying Tiger Line* v. *Atchison T. & S. F. Ry. Co.*, 75 F. Supp. 188 (C.D. Cal. 1947). As this Court observed in *C.A.B.* v. *Aeromatic Travel Corp.*, *supra* at 254, n.8:

> Section 1487(a) specifically allows private parties in interest to enforce 49 U.S.C. § 1371(a), one of the sections relevant to this case. *This suggests that Congress intended to allow even private parties to enforce that section of the Act without prior reference to the Board.* The Ninth Circuit has upheld a preliminary injunction in a suit brought by a private party to enjoin activities similar to that of appellees without prior reference to the Board. (The CAB, was, however, an amicus curiae). *Monarch Travel Services, Inc.* v. *Associated Cultural Clubs, Inc.*, 466 F.2d 552 (9th Cir. 1972) [emphasis added.]

Similarly, as the First Circit observed in *World Airways, Inc.* v. *Northeast Airlines, Inc.*, *supra* at 1010:

> Nothing in § 1487(a) requires the exhaustion of administrative remedies before the invocation of court action.

The standard for determining whether the CAB has primary jurisdiction over the issues raised herein was formulated by this Court in *C.A.B.* v. *Modern Air Transport, Inc.*, 179 F.2d 622, 624 (2d Cir. 1950), as follows:

> Under this doctrine the courts will not determine a question within the jurisdiction of an administrative tribunal prior to the decision of the

> tribunal where the question demands the exercise of administrative discretion requiring the special knowledge and experience of the administrative tribunal. . . . This self-denying doctrine has been used by the courts as a ground for refusing to decide the difficult issues of reasonableness of a rate of fairness of a regulation which fall within the area of special competence of the particular administrative agency and for which the agency is said to have primary jurisdiction. . . . *But this doctrine is not applicable where the issue, regardless of its complexity, is not the reasonableness of the rate or rule, but a violation of such rate or rule.* [Emphasis added.]

*See also World Airways Inc.* v. *Northeast Airlines, Inc. supra* at 1010-1011.

Application of this criterion to the issues alleged in the complaint herein demonstrates that those issues do not necessitate the making of any policy determinations which are the prerogative of the CAB in the first instance. The question raised in this case is whether appellants have violated Section 401(a) of the Act, 49 U.S.C. § 1371 (a), and/or any regulations promulgated thereunder which reflect policy determinations *already made* by the CAB. Judge Stewart applied this criterion aptly as follows:

> Defendants suggest that the CAB may be in the process of reevaluating some of its current rulings concerning the extent to which direct carriers may be involved in all kinds of charter operations. We recognize that such questions as when it is in the public interest for the CAB to allow a direct carrier to market charters through a controlled affiliate and whether changes in any of the current rules and regulations may be necessary to further

> the public interest, involve matters of policy which are appropriate for the CAB and Congress to decide. However, we are not being asked to rule on these questions in this action. *We are, rather, being asked to determine whether the defendants TAS, TITO and TI are controlled by the defendant TWA so as to make the current charter arrangements between TWA and the other defendants violative of 49 U.S.C. § 1371(a). Thus, we do not think that the policy issues raised by defendants are involved here and we do not think it either necessary or appropriate for us to defer to the CAB.* (A. 107) [Emphasis added]

The CAB agrees.

Appellants' reliance upon such cases as *Pan American World Airways* v. *United States*, 371 U.S. 296 (1963) is misplaced. *Pan American* dealt with an alleged antitrust violation that could arguably be remedied or exempted by the CAB and which in any event entailed elaborate economic policy judgments not present herein. *See C.A.B.* v. *Aeromatic Travel Corp.*, *supra* at 254, n.10. Moreover, inasmuch as the CAB will shortly move to intervene, the District Court will not have to forego the benefit of its views with respect to the interpretation of any relevant statutes or regulations which may be necessary.

Appellants also make repeated reference to the fact that the tour programs in question have been "approved" by the CAB pursuant to 14 C.F.R. §§ 371 and 378. No formal "approval" is actually conferred upon such programs by these regulations which require that various documents be filed with the CAB. These regulations do not anticipate a review which includes investigation of the accuracy of the information contained in the documents. Moreover, the violations alleged in the complaint

are not the sort which would be disclosed on the face of the docments which must be filed pursuant to these regulations. In short, if any such "approval" was in fact given, it was limited to determining whether the documents filed were in proper form and contained the information required by the regulations.

Finally appellant Trans World Airlines ("TWA") contends that the CAB is already exercising administrative jurisdiction in this case (TWA Appellate Brief, p. 13). In fact, the only action heretofore taken by the CAB has been an informal investigation preparatory to litigation. That effort is an informal non-public investigation, as distinguished from an administrative adjudicatory proceeding, undertaken by the Bureau of Enforcement of the CAB.* The CAB has never entertained an adjudicatory proceeding in connection with the matters raised in the complaint.** Accordingly there is no adjudicatory proceeding pending before the CAB which could conflict with the hearing of this case by the District Court. Inasmuch as the CAB intends to intervene in the action, the possibility, if any, of conflict has been removed.

Appellants have conceded that if the CAB were a plaintiff in the action, the doctrine of primary jurisdic-

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* The Bureau of Enforcement is a bureau of the CAB acting as its agent. Its delegated responsibilities, set forth at 14 C.F.R. § 385.22 include the issuance of orders initiating informal investigations pursuant to 14 C.F.R. §§ 305 *et seq*, and the initiation and prosecution in any court of all necessary proceedings for the enforcement of the provisions of the Act or any rule, regulation, requirement or order promulgated thereunder.

** The issuance of a confidential order by the CAB to foster that investigation through administrative subpoena pursuant to 14 C.F.R. § 305 does not change the character of the investigation.

tion would be inapplicable (TWA Appellate Brief, p. 18). For the reasons stated above, the CAB respectfully submits that the doctrine should not be applied to this case even though the CAB is not presently a party. Whatever the merits of appellants' claim, however, inasmuch as the CAB intends to move to intervene in the action, this issue will become moot if the motion is granted.

## CONCLUSION

**It is respectfully submitted that the District Court correctly denied the motion to dismiss the complaint.**

Dated: New York, New York
April 13, 1977

Respectfully submitted,

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State of New York )
County of New York ) ss

Manuel Bermudez being duly sworn, deposes and says that he is employed in the Office of the United States Attorney for the Southern District of New York.

That on the 15th day of April 19 77 he served 2 copies of the within govt's brief

by placing the same in a properly postpaid franked envelope addressed:

1) Chadbourne, Parke, Whiteside & Wolff, Esqs., 30 Rockefeller Plaza, NY NY 10020

2) Marshall, Bratter, Greene, Allison & Tucker, Esqs., 430 Park Ave. NY NY 10022

3) Robert M. Beckman, Esq., Suite 235 1001 Connecticut Ave. NW Wash DC 20036

4) Dickstein, Shapiro, & Morin, Esqs., 745 Fifth Ave. NY NY 10022

And deponent further says he sealed the said envelopes and placed the same in the mail chute drop for mailing in the United States Courthouse Annex, One St. Andrews Plaza, Borough of Manhattan, City of New York.

Manuel Bermudez

Sworn to before me this
15th day of April, 19 77

Pauline P. Troia

PAULINE P. TROIA
Notary Public, State of New York
No. 31-4632381
Qualified in New York County
Commission Expires March 30, 1978